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No. 793

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

MARK FEIN, *Appellant*

v.

THE PEOPLE OF THE STATE OF NEW YORK

On Appeal From the Court of Appeals of the State of New York

APPELLANT'S BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

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I

The compelling reasons why this Court should review the present case, as set forth in our Jurisdictional Statement, now have been confirmed and fortified by subsequent developments.

After our Jurisdictional Statement was filed, the Court rendered its decision in No. 81, *Parker* v. *Gladden,* 385 U.S. —, 87 S.Ct. 468, decided December 12, 1966. There the Court has expressly adopted the view that the constitutional guaranty of trial by jury is a "command of the Sixth Amendment, made applicable to the States through the Due Process Clause of the Fourteenth Amendment" (87 S.Ct. at 470). Indeed, the deliberateness of the Court's adoption of this view is underscored by Mr. Justice Harlan's statement, in his dissenting opinion, that "I cannot accede to the view that the Sixth Amendment is directly applicable to the States through the Fourteenth" (87 S.Ct. at 472).

Especially after *Parker* v. *Gladden,* there no longer can be any genuine doubt that New York's blue ribbon jury statute and procedure, as utilized and applied against appellant in this case, is unconstitutional. The five-to-four decisions sustaining constitutionality in *Fay* v. *New York,* 332 U.S. 261, and *Moore* v. *New York,* 333 U.S. 565—these being the decisions on which the New York Court of Appeals here placed its entire reliance (Jurisdictional Statement, p. 2a)—had already been wholly undermined by the later course of decisions, as we showed in our Jurisdictional Statement (pp. 29-35). Now, however, *Parker* v. *Gladden* makes manifest the completion of the change. *Fay* and *Moore* cannot be reconciled with the view this Court has so recently expressed concerning the scope of the Sixth Amendment's guaranty of trial by jury and its application to the States.

The District Attorney's Motion to Dismiss or Affirm (pp. 2-3, 9-10) seeks to suggest that the blue ribbon

jury issue was presented in the state courts solely as an alleged denial of appellant's federal constitutional rights (reviewable only on certiorari) and hence should not be entertained by this Court as an appeal as of right challenging the validity of the New York blue ribbon jury statute. But as we have pointed out (Jurisdictional Statement, pp. 7-8), the validity of the New York blue ribbon jury statute was expressly drawn in question in the trial court by appellant's timely pleading (R. 174A-175A), filed in advance of trial in response to the prosecution's motion for a special jury. In view of this, and in view of the further fact that the entire basis of the New York blue ribbon jury procedure is the statute which appellant challenged, it is evident that the validity of the statute was properly drawn in question in the state courts. Moreover, the plain intendment of the New York Court of Appeals decision was to uphold the statute's validity as against appellant's claims. Accordingly it is clear that the question is properly here as an appeal question.

But even if it were otherwise, the considerations we have adduced are, we submit, equally compelling for the granting of certiorari. The use of the blue ribbon jury infects this trial with a basic constitutional infirmity. And the non-representative nature of the panels from which this blue ribbon jury was selected is clear (Jurisdictional Statement, p. 8). The New York Court of Appeals has rested its judgment on the authority of this Court's five-to-four decisions in *Fay* and *Moore*—decisions which now, having lost their last glimmer of vitality, are in irreconcilable conflict with the views this Court more recently has adopted.

Moreover, the blue ribbon jury question is a fundamental constitutional issue which, if it is not resolved

by a decision of this Court on the merits in this direct review proceeding, will remain open for adjudication in a subsequent collateral attack proceeding. *United States ex rel. Poret and Labat* v. *Sigler,* 361 U.S. 375; *Bailey* v. *Henslee,* 361 U.S. 945, and 287 F. 2d 936 (8th Cir. 1961), certiorari denied, 368 U.S. 877; *Whitus* v. *Balkcom,* 370 U.S. 728, and 333 F. 2d 496 (5th Cir. 1964), certiorari denied, 379 U.S. 931. Certainly it is in the interests of justice, as well as the orderly administration of the criminal law, that the matter be resolved at this time instead of being deferred until later.

II

The District Attorney now (Motion to Dismiss or Affirm, p. 32) finds it necessary to concede that:

> "unlike the standards to be met before a second trial will be held on the ground of newly discovered evidence, the appellant, in order to obtain another trial, need only show that the District Attorney failed to correct testimony he knew to be perjured. This follows even where the sole point goes to the credibility of that witness."

Since, as demonstrated at pp. 16-20 of the Jurisdictional Statement, the prosecutor did, indeed, "fail to correct testimony he knew to be perjured"—including testimony given by the prosecution's own detective—this record requires that the judgment be set aside and a new trial granted.

But by distorting the record and by misapplying basic principles, the District Attorney's Motion to Dismiss or Affirm attempts to justify or minimize the flagrant constitutional violations which occurred here. Accordingly, it may be helpful to the Court if we re-

spond briefly to at least those distoritions which relate to the prosecution's suppressions and the prosecution's sponsorship of false testimony concerning Mrs. Dagmar Generazio and Gloria (the prosecutor's key witness).[1]

The District Attorney (Motion to Dismiss or Affirm, pp. 32-37) gives the spurious answer that, when Gloria and Detective Leman in their testimony at the trial concealed the presence of Mrs. Dagmar Generazio at the September 28th confrontation meeting with Gloria in the prosecutor's office, they were limiting themselves to the precise moment of Gloria's recantation and excluded the important confrontation scene which directly preceded and precipitated it. This, as shown at pp. 19-20 of our Jurisdictional Statement, is specious. Indeed it would involve a complete rewriting of the actual record. Detective Leman and Gloria, when testifying who was present at the September 28th meeting in the prosecutor's office, each named Detective Leman. Particularly since Detective Leman was present during the confrontation but was no longer present at the actual moment of Gloria's recantation, it is obvious that their trial testimony referred to the confrontation scene in the prosecutor's office, when in actuality Mrs. Dagmar Generazio (as well as Detective Leman) was present, and not to the moment of recantation. The plain fact is that Mrs. Generazio's presence was a critical event which was the whole purpose of the meeting. This event was perjuriously concealed and the prosecution succeeded in keeping it from the defense and from the jury until after the trial.

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[1] These matters have been covered initially at pp. 9-20 and 36-43 of our Jurisdictional Statement.

Contrary to what the District Attorney now suggests (Motion to Dismiss or Affirm, pp. 36-37), the questions asked at the trial of Gloria and of Detective Leman were neither "ambiguous" nor "non-specific". Gloria, when asked about her September 28th meeting with Mr. Dermody (the prosecutor), testified that the persons present, in addition to herself and the prosecutor, were "I think Detectives Lyons and Leman", and "I don't remember anyone else" (R. 1392-1393). She then testified that Detective Leman left the room because she wanted him out (R. 1393). Thus Gloria's answer, placing Detective Leman in the room, obviously described that part of the meeting at which—as it was discovered after the trial—Mrs. Dagmar Generazio had also been present. Similarly, Detective Leman testified at the trial that during the September 28th meeting in the prosecutor's office Gloria stated she did not want to talk with Leman there and she wanted her lawyer to be present (R. 1635-1637). Detective Leman was specifically asked, "who was in the room at that time" (R. 1638). This was the time when —as the prosecutor himself admitted at the post-trial hearing—Mrs. Dagmar Generazio was present, the important confrontation scene took place as a result of which Gloria "said that she wanted to speak to a lawyer," and it was only after this that "Dagmar left the room with Detective Leman" (Dermody, R. 3496-3497). Yet in his testimony at the trial Leman answered the question by giving the names of everyone else present including himself—and he carefully omitted the name of Mrs. Generazio (R. 1638).

Thus both Gloria and Detective Leman lied at the trial in answer to specific questions. Their perjury became part and parcel of the prosecution's systematic

suppression. The prosecution's deep involvement is evident. The perjury related to a meeting which had taken place not merely in the prosecutor's office but in the prosecutor's presence—a meeting called by the prosecutor for the very purpose of confronting Gloria with Mrs. Generazio's evidence. And on the same day Gloria gave this false testimony at the trial, the prosecution once again telephoned and spoke at length to Mrs. Generazio, confirming its full awareness of the perjuries committed. (Jurisdictional Statement, pp. 14-15, 18.) Yet the prosecution left those perjuries totally undisclosed and totally uncorrected.

In addition, the Motion to Dismiss or Affirm would have this Court ignore not only the prosecution's knowing sponsorship of perjured testimony, but also all the other aspects of the prosecution's shocking suppression of Mrs. Dagmar Generazio and of the evidence she had furnished the prosecution concerning Gloria's telephone request of her. No amount of whitewash can obscure this shabby and unconstitutional course of suppression by the prosecution. The prosecution did everything possible to obliterate all trace of Mrs. Dagmar Generazio from the case—and everything possible to prevent this serious threat to its case and to Gloria's credibility from ever coming before the jury. Even if the prosecutor disbelieved what Mrs. Generazio told him, this furnishes no justification for the suppression. Nor does the fact that, at the post-trial hearing, the trial judge declined to believe Mrs. Generazio. Certainly the constitutional right to trial by jury assures that credibility of witnesses is to be determined not by judges and not by prosecutors, but by the jury. See, e.g., *Jackson* v. *Denno,* 378 U.S. 368, 386 note 13; *Quercia* v. *United States,* 289 U.S. 466, 470-472. The jury was prevented

from exercising this responsibility because of the prosecution's conduct. Yet having been wholly successful in its endeavor to keep all this evidence from reaching the jury, the prosecution now seeks to invoke the standards and authorities applicable merely to "newly discovered evidence" (Motion to Dismiss or Affirm, pp. 27-29) and not those applicable where perjury has been knowingly sponsored or where evidence has been suppressed by the prosecution.

The District Attorney (Motion to Dismiss or Affirm, pp. 23, 31-32, 39) also seeks to support the judgment by claiming the prosecution's whole course of concealment and suppression may be disregarded because the defense was sufficiently "aware" of what was suppressed. But as we have shown (Jurisdictional Statement, pp. 20, 39), a defense investigator during the trial had learned no more than a "grapevine rumor" that a girl named Dagmar Finch had told the District Attorney's Office that Gloria had called her for the loan of a car. The defense did not know, and had no reason to know, that Dagmar Finch had married, that her married name was Mrs. Generazio, and that she was no longer in the State but was living in New Jersey. These facts all were fully known to the prosecution, which was in virtually continuous contact with her both by personal conference and by telephone; and, indeed, the prosecution's chief investigator on the case, Detective Leman, affirmatively refused to give any such information to the defense when a request was made during the trial (Jurisdictional Statement, p. 20). Moreover, the prosecution never gave the defense any information concerning what Mrs. Generazio had told the prosecution, and never gave the defense any inkling con-

cerning the important and explosive confrontation scene which had occurred in the prosecutor's office between Mrs. Generazio and Gloria. Nor did the defense know, or have any reason to know, of what Mrs. Generazio had told the prosecution concerning Gloria's subsequent efforts to induce Mrs. Generazio to "stick with her" (Jurisdictional Statement, pp. 13, 41). All this, which the defense should have had the opportunity to bring before the jury, was relentlessly and successfully suppressed and concealed by the prosecution until after the trial was over and the verdict was in.

III

As our Jurisdictional Statement shows (pp. 46-50), the question of appellant's standing to challenge the unconstitutional seizure of the chair from the warehouse is an important constitutional question as to which a marked conflict exists in the decisions. The very recent decisions, most of them reported subsequent to the filing of our Jurisdictional Statement, confirm that this basic question—that is, the question whether evidence seized in violation of the Fourth Amendment "shall not be used at all" (*Mapp* v. *Ohio*, 367 U.S. 643, 648)—continues to be a matter of recurring and widespread importance in both federal and state courts. *Elbel* v. *United States*, 364 F. 2d 127, 136-138 (10th Cir., 1966); *Corngold* v. *United States*, 367 F. 2d 1, 7 (9th Cir., 1966), *State* v. *Newson*, 26 Conn. Sup. 297, 222 A. 2d 236 (1966); *State* v. *McParlin*, 221 A. 2d 790 (R.I., 1966); *People* v. *Loncar*, 4 Mich. App. 281, 144 N.W. 2d 801 (1966). The matter urgently requires resolution by this Court at this time in order that the policies enunciated in *Mapp* and succeeding decisions of this Court be not circumvented.

Moreover, somewhat comparable questions are now before the Court in No. 750, *Granello* v. *United States,* pending on petition for certiorari from the Second Circuit's decision in *United States* v. *Granello,* 365 F. 2d 990, 995-996.

In purported reliance on *Abel* v. *United States,* 362 U.S. 217, and *Hester* v. *United States,* 265 U.S. 67, the District Attorney suggests (Motion to Dismiss or Affirm, p. 18) that in this case the warrantless search and seizure took on an entirely different legal significance because of appellant's alleged abandonment of the chair. As we have pointed out (Jurisdictional Statement, pp. 44-45), there was no abandonment of the chair (which was stored under appellant's own pseudonym), and, furthermore, the New York courts have even denied appellant his constitutional right to a hearing on the issue, at which the critical facts could have been ascertained. Moreover, *Abel* and *Hester* are in any event wide of the mark because, contrary to the present case, they involved searches and seizures which did not violate anyone's Fourth Amendment rights. In *Abel,* for example, the defendant had vacated the hotel room where the search took place and had abandoned the property seized therefrom, and the hotel management, wholly unlike the warehouse manager in this case, freely gave its consent (362 U.S. at 241) to the search and seizure.[2]

The District Attorney's further contention (Motion to Dismiss or Affirm, pp. 16-17) that appellant's mo-

[2] Indeed, *Abel* and *Hester* were distinguished on such grounds in *United States* v. *Merritt,* 293 F. 2d 742, 745 (3rd Cir. 1961), a decision which, as we already have noted (Jurisdictional Statement, p. 44), can hardly be squared with that of the New York Court of Appeals in the present case.

tion for a hearing was untimely and that his objection was knowingly waived is frivolous. The record conclusively demonstrates that the question of the unconstitutionality of the search and seizure was raised in a timely manner (Jurisdictional Statement, pp. 25-26). Not only did appellant's counsel not waive his objection to the admissibility of the chair as evidence, but, when it was admitted into evidence, he objected and sought a hearing. This request the trial judge rejected despite a clear showing on the record of a prior understanding with the court that appellant's rights to a hearing were being fully preserved. Finally it should be noted that the New York Court of Appeals did not conclude that this question had not been properly preserved; instead, it expressly decided it on the merits, on the sole specious ground that "abandonment" resulted in lack of standing. (Jurisdictional Statement, p. 3a).

CONCLUSION

For the reasons set forth in our Jurisdictional Statement, as reinforced by the additional reasons set forth in this Brief, the Court should note probable jurisdiction without limitation, and should give consideration to the merits so as to lead to reversal of the judgment below.

Respectfully submitted,

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